Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

NO. 05-87

SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

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**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Robert Eliot Harlan, the Respondent, moves pursuant to Rule 39, for leave to proceed in forma pauperis and without payment of fees or costs in this matter, for the following reasons:

1. Mr. Harlan is today filing a Brief in Opposition in this Court.

2. Mr. Harlan has been represented by court appointed counsel, the Colorado State Public Defender, throughout his state appeals and throughout the proceedings in state district court. He has been declared indigent by all courts of the State of Colorado and has proceeded in forma pauperis since the time he was charged in 1994 with the offense that led to his conviction and incarceration.

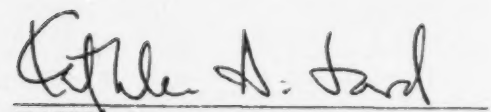
3. Mr. Harlan is incarcerated in the Colorado Department of Corrections and is without funds with which to pay the costs of this proceeding. An affidavit in support of Mr. Harlan's request for leave to proceed in forma pauperis is attached to this motion.

4. Mr. Harlan should not be deprived of his opportunity to respond to the State's petition for a writ of certiorari solely due to his indigency. Accordingly, he requests leave to proceed in forma pauperis.

WHEREFORE, the Respondent, Mr. Harlan, through undersigned counsel, respectfully requests this Court to grant him leave to proceed *in forma pauperis*.

**Dated this 17th day of August, 2005.**

DAVID S. KAPLAN
Colorado State Public Defender



KATHLEEN A. LORD
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*Counsel of Record

NO. 05-87

SUPREME COURT OF THE UNITED STATES

October Term, 2005

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THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

---

**AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

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DAVID S. KAPLAN
Colorado State Public Defender

KATHLEEN A. LORD*
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(303) 620-4888

*Counsel of Record

**AFFIDAVIT OF ROBERT HARLAN IN SUPPORT**

**OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

I, Robert Harlan, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in filing a Brief in Opposition to the Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of proceedings or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of filing a Petition for Writ of Certiorari and related proceedings are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

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b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1994, $1500 per mo.

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and other clothing? NO

a. If the answer is yes, describe the property and state the approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
NONE

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

8-17-05

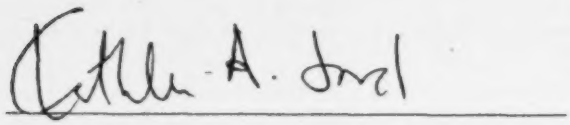
Subscribed and sworn to before me this ____ day of August, 2005, in the County of Fremont, State of Colorado.

My commission expires on _____

Questions read to Harlan by case manager Donna Murphy because Harlan has a blurred vision problem. Signed by Harlan in my presence
Donna Murphy
719 269-5282 TOTAL P.03

## CERTIFICATE OF SERVICE

I, Kathleen A. Lord, hereby certify that a copy of the forgoing Motion to Proceed *in Forma Pauperis* and Affidavit in Support of Motion for Leave to Proceed *In Forma Pauperis* was deposited in the United States mail on August 17, 2005, and addressed to: Don Quick, District Attorney, 17th Judicial District, 1000 Judicial Center Drive, Suite 100, Brighton, Colorado 80601.



NO. 05-87

SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

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# BRIEF IN OPPOSITION

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On Certiorari to the Colorado Supreme Court
Case No. 03SA173

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DAVID S. KAPLAN
COLORADO STATE PUBLIC DEFENDER

KATHLEEN A. LORD*
CHIEF APPELLATE DEPUTY PUBLIC DEFENDER
ATTORNEY FOR RESPONDENT
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*Counsel of Record

## INTRODUCTORY MATTERS

This brief in opposition is being filed pursuant to Supreme Court Rule 15. This Rule permits a respondent to initially waive a brief in opposition in all cases except those denominated a "capital case," pursuant to Rule 14.1(a). Although the People of the State of Colorado (hereinafter "the State") have identified this as a "capital case" on the first page of the petition for writ of certiorari, Respondent disputes this characterization.

Rule 14.1(a) provides that "[i]f the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented." Mr. Harlan was sentenced to death in 1995. However, on May 22, 2003, the state district court judge ordered that:

> The death sentence imposed against the Defendant Robert Eliot Harlan is hereby vacated and set aside. It is further ordered that the Defendant shall be returned to and appear before this Court as promptly as is possible so that he may be resentenced, pursuant to, and consistent with Colorado law. [Petition at A97]

The State appealed this Order to the Colorado Supreme Court. Because Colorado law does not clearly provide the State with the right to appeal a district court order vacating a death sentence, the supreme court treated the State's appeal as if it were an original proceeding. [*See* Petition at A14-A15]. The state supreme court, in affirming the lower court's ruling, writes:

> [W]e uphold the trial court's judgment vacating the death sentence and imposing upon Harlan a life sentence without the possibility of parole, and we discharge the rule. [Petition at A42]

Although the Colorado Supreme Court ultimately recalled and stayed the issuance of its mandate pending this Court's ruling on certiorari, Mr. Harlan's death sentence was vacated with the district court's order in May of 2003. Moreover, as explained in the Argument section below, the state courts in *People v. Harlan* have decided the issues presented purely as a matter

of state law. Accordingly, the respondent Robert Harlan is not under a death sentence that may by affected by this Court's disposition of the petition.

## ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

I. The State Court Rulings Did Not Reach Any Federal Question

Attached to the Petition are the rulings of the state court district court judge and the state supreme court. The courts' opinions speak for themselves and establish that both courts decided this case based on: (1) the unique facts as found by the district court after extensive analysis and credibility determinations; and (2) Colorado state law.

The State's version of the facts was rejected by the district court judge who made extensive findings of fact and credibility determinations, (Petition at A61-A90), to conclude that:

A) **Several jurors read, researched and reviewed bibles and took notes from bibles in their hotel rooms during the Friday evening recess.** (A79)

> **Several jurors researched and reviewed bibles on Friday evening, June 30, 1995, to locate biblical passages pertaining to the penalty for murder. Some of the jurors wrote down the biblical passages they located so that they could take them to the jury deliberation room to share with other jurors on Saturday morning, July 1, 1995, when the jury reconvened to continue their deliberations.** (A82)

B) **Some jurors took a bible, bible index or notes with biblical passages into the jury deliberation room.** (A82)

> **Jurors took bibles and notes with biblical passages concerning the penalty for murder into the jury deliberation room on Saturday morning, July 1, 1995. These materials were read and discussed among and between jurors prior to a verdict being reached.** (A86)

C) **The evidence did not show that juror use of the bible, bible index or notes with biblical passages occurred only when jurors were in the fourth step of their deliberations** [i.e., after determining the defendant's eligibility for a death sentence]. (A87)

> **Jurors were exposed to bibles and bible passages concerning God's view on punishment for murder while they were sequestered during their deliberations on**

> **the penalty phase of the Defendant's trial. This occurred when they took the evening recess on Friday, June 30, 1995 and when they resumed their deliberation on Saturday, July 1, 1995. The biblical passages were read and discussed in the jury room. This occurred prior to the jury reaching a unanimous verdict. The credible evidence does not indicate that jurors were at a particular step in the four step process. What is certain is that a verdict imposing the death sentence had not been reached at the time the extraneous materials were considered.** [A89-A90]

(bold text in district court's original ruling).

The state district court applied Colorado law to its factual findings and ruled the death verdict must be reversed, because there was a "reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations." [Petition at A90, quoting *Wiser v. People,* 732 P.2d 1139, 1143 (Colo. 1985)]. The state district court also ruled that the Colorado death penalty statute required reversal, since it provides that "[a] sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor...." Section 16-11-103 (6) (b), 8A C.R.S. (1994 Cum.Supp.).

On appeal, the Colorado Supreme Court held that the district court's factual findings were supported by the record and that, under Colorado law, particularly *Wiser* and CRE 606(b), the death sentence must be vacated. (Petition at A5, A13, A29, A39). Moreover, the supreme court exercised its "independent responsibility," pursuant to §16-11-103(6) (b) and concluded that it could no longer say "that the death penalty verdict was not influenced by passion, prejudice, or some other arbitrary factor." (Petition at A13, citing *People v. Harlan,* 8 P.3d 448, 499-501 (Colo. 2002) (on direct appeal, the state supreme court had conducted its statutorily required independent review pursuant to §16-11-103(6)(b) and had affirmed the death penalty,

even though it was "troubled by several racial dimensions of this case and [concern] that racial bias may have been a factor in the imposition of the death sentence." *Id.* at 499.).

II. Certiorari Should Not Be Granted.

The Colorado Supreme Court relied exclusively on its interpretation of state law when it decided *In re People v. Harlan*, 109 P.3d 616 (Colo. 2005). [A copy of *Harlan* is attached to the petition as A1-A53]. Thus, this case presents no federal issue and the State has no basis for invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). Moreover, the two issues raised in the State's petition were not raised or addressed in the state courts below.

In its Question No.1, the State asserts that the Colorado Supreme Court "improperly undermine[-d] the jury's constitutional responsibilities under the Sixth Amendment and Eighth Amendments...." [Petition at i.] The State lacks standing to assert the alleged constitutional violations— the cited amendments create rights for the accused, not the government. Moreover, the Colorado Supreme Court did not rely on these constitutional provisions in reaching its decision.

In addition, the State mischaracterizes the state supreme court's ruling when it represents in Question No.1 that the state supreme court ruled "that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision without finding that jurors rested their moral decisions on biblical code rather than Colorado law." [*Id.*] This is not a case involving "the mere presence of a Bible" during deliberations. Rather, as noted above, the district court made extensive findings as to the jurors' actual use of mandatory death penalty passages from the Bible during deliberations.

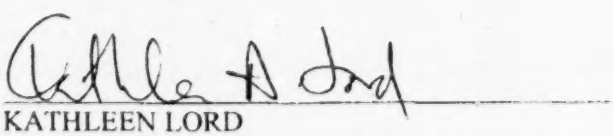
In its formulation of Question No.2, the State mischaracterizes the state supreme court's decision and presents a question of law that is not fairly raised by the *Harlan* decision. The State erroneously suggests that the Colorado Supreme Court adopted a standard of review that "improperly creates a new constitutional structural error because it would foreclose or prevent harmless error review in every case where [the presence of a Bible during the last stage of the death penalty jury deliberations] occurred." [Petition at i.]. In fact, the Colorado Supreme Court conducted a thorough analysis of the record for prejudice as required by state law. [Petition at A31-A39]. Under state law, the *Wiser* "objective test" applies for ascertaining prejudice. (*See Harlan,* A19, *citing People v. Wadle,* 97 P.3d 932 (Colo. 2004); *Wiser, supra*). Here, the Colorado Supreme Court carefully examined the nature of the Bible material introduced into the jury room and concluded, again as a matter of state law, that the jurors' exposure to extraneous material was prejudicial, i.e., that there was "a reasonable possibility that the extraneous biblical texts influenced the verdict to Harlan's detriment." *See Harlan,* A31-A39.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

DAVID S. KAPLAN

Colorado State Public Defender



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CERTIFICATE OF SERVICE

I, Kathleen A. Lord, hereby certify that a copy of the foregoing Brief in Opposition was served by depositing the same in the U.S. mail, prepaid, on August 17, 2005, and addressed to: Don Quick, District Attorney, 17th Judicial District of Colorado, 1000 Judicial Center Drive, Suite 100, Brighton, Colorado 80601.

Kathleen A. Lord 8/17/05